

PATENT
Application 10/532,404
Attorney Docket 1054-003

REMARKS

Applicant respectfully thanks the Examiner for the consideration provided to this application, and respectfully requests reconsideration of this application.

Claims 1 - 76 are now pending in this application. Each of claims 1 and 33 is in independent form.

The Restriction Requirement

In response to the Restriction Requirement, Group I (claims 1-32) is elected. This election is made with traverse.

As an initial matter, it is respectfully submitted that 35 U.S.C 121 is only applicable if two or more independent and distinct inventions are claimed in one application. A *prima facie* showing of both requirements, and particularly the independence requirement, has not been made. For example, a relationship has been disclosed between the subject matter of each of the presented claims.

It is apparent that 35 U.S.C 121 "provides the Commissioner with the authority to promulgate rules designed to restrict an application to one of several claimed inventions when those inventions are found to be 'independent and distinct.'" *In re Weber*, 580 F.2d 455, 198 USPQ 328 (CCPA 1978). Yet, Applicant respectfully submits that 35 U.S.C 121 only applies if the USPTO shows two or more "independent and distinct" inventions are claimed in one application. *See also*, 37 CFR 1.141 and 37 CFR 1.142.

Regarding the present application a *prima facie* showing of both requirements has not been made. For example, a relationship has been disclosed between the subject matter of each of the claims of Group I and Group II. *See*, MPEP 802.01. To the extent that the USPTO interprets the statute's "independent and distinct" requirement as an "independent or distinct" requirement, replacing the statute's conjunctive "and" with a disjunctive "or" (*see*, MPEP 803), that interpretation is clear legal error (*R&W Flammann v. U.S.*, 339 F.3d 1320 (Fed. Cir. 2003) ("a regulation that contravenes a statute is invalid") (*citing United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982))). "[I]t is recognized that the PTO must have some means for controlling such administrative matters as examiner caseloads and the amount of searching done per filing fee. But, in drawing priorities between the Commissioner as administrator and the applicant as

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beneficiary of his statutory rights, we conclude that the statutory rights are paramount." *In re Weber*, 580 F.2d 455, 198 USPQ 328 (CCPA 1978).

Moreover, no reasonable showing of a lack of unity of invention between claim 1 and any of the remaining claims of the application has been presented. Further, no reasonable showing of a lack of unity of invention between the claims of Group I and Group II has been presented. "It is improper for the Office to refuse to examine that which applicants regard as their invention, unless the subject matter in a claim lacks unity of invention." *See* MPEP 803.02. *See also*, 35 U.S.C. 101, and *Steinmetz v. Allen*, 192 U.S. 543, 563 (1904). "Reference to the widely-recognized concept of 'unity of invention' has been made in order to suggest an appropriate term to apply where unrelated inventions are involved -- inventions which are truly independent and distinct". *In re Harnisch*, 631 F.2d 716; 206 U.S.P.Q. 300 (CCPA 1980).

CONCLUSION

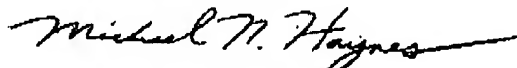
It is respectfully submitted that the application is in clear condition for allowance.

Reconsideration; withdrawal of all grounds of rejection, and issuance of a Notice of Allowance are earnestly solicited.

The Office is hereby authorized to charge any additional fees or credit any overpayments under 37 C.F.R. 1.16 or 1.17 to Deposit Account 50-2504. The Examiner is invited to contact the undersigned at 434-972-9988 to discuss any matter regarding this application.

Respectfully submitted,

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